

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY LENNEL STEPHENS,

Defendant-Appellant.

UNPUBLISHED

May 12, 2009

No. 284251

Wayne Circuit Court

LC No. 07-012349-FC

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon, MCL 750.227. He was sentenced to 40 to 60 months in prison. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The sentencing court departed from the guidelines range of zero to 17 months, indicating it disagreed with the jury's verdict and thought that this case involved a brutal murder.¹ The sentencing court stated that self-defense was contraindicated by the fact that the victim was shot in the back, and was shot 11 times.

Defendant argues that the departure was error because the jury heard the same facts and acquitted him, implicitly concluding that he did not commit a brutal murder but was in fact the victim. We disagree.

While facts supporting a departure from a maximum sentence must be admitted by the defendant or found by a jury beyond a reasonable doubt, *Blakely v Washington*, 542 US 296, 301; 124 S Ct 2531; 159 L Ed 2d 403 (2004), this rule does not apply to the minimum sentence of an indeterminate sentence under Michigan's sentencing scheme. See *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). Defendant notes that the guidelines calculation resulted in a

¹ Defendant was acquitted of first-degree murder, MCL 750.316, the lesser included offense of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. At trial, defendant claimed that he shot the victim in self-defense.

recommendation within an intermediate sanction cell, such that probation or a jail sentence would apply under MCL 769.34(4) absent a substantial and compelling reason for departure. However, this range refers to the minimum sentence of defendant's indeterminate sentence. *People v Harper*, 479 Mich 599; 739 NW2d 523 (2007). Thus, *Blakely* did not apply.

Defendant further asserts that departure was not warranted because various offense variables took the death of the victim into account, as defendant was scored for discharging a firearm at a human being and killing a victim. Given these facts, defendant claims that the trial court did not articulate substantial and compelling reasons for a departure. We disagree.

A substantial and compelling reason exists only in exceptional cases, must be objective and verifiable, must keenly or irresistibly grab a court's attention, and must be of considerable worth in deciding the length of a sentence. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). A departure may not be based on "an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). Here, the objective and verifiable facts are that a killing was associated with the carrying of the concealed weapon. Moreover, the victim was shot in the back and was shot 11 times. These facts support the court's conclusion that this was a brutal murder. Moreover, the facts "keenly" grab this Court's attention, and were of considerable worth in deciding the length of defendant's sentence.

Affirmed.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens